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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 404

GERARDO A. RE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 405

GERARD F. RE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 406

CHARLES A. CASAGRANDE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 410

ELY BATKIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (II. 145-169)[1] is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 1964 (II. 170). On August 19, 1964, petitioners Gerardo A. Re, Gerard F. Re, and Charles Casagrande filed separate petitions for writs of certiorari. On August 20, 1964, petitioner Batkin filed a petition for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the fact that a witness and certain petitioners had previously been advised by the same attorney precluded the government from using the testimony of the witness.

2. Whether accounting ledgers showing cash "payoffs" were admissible under either the shop book rule or as declarations of conspirators in furtherance of the conspiracy.

3. Whether statements made by certain petitioners before the S.E.C. were properly admitted solely against the declarant.

4. Whether the statutory provisions against manip-

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[1] The certified record is in two volumes. Volume I contains the petitioners' appendix in the court below. Volume II contains the government's appendix below supplemented by the proceedings in the court of appeals.

ulating stocks is unconstitutionally vague as applied to those petitioners who were specialists.

5. Whether the statute prohibited the sale of the unregistered "control" stock involved in this case.

6. Whether the trading of stock on the floor of the American Stock Exchange was, in this case, a prohibited use of a means of communication in interstate commerce.

STATUTES INVOLVED

Pertinent parts of Sections 2, 4 and 5 of the Securities Act of 1933 [15 U.S.C. 77b(11), 15 U.S.C. 77d (1), 15 U.S.C. 77e (a) (1)], and of Sections 3 and 11 of the Securities Exchange Act of 1934 [15 U.S.C. 78c (a) (2), 15 U.S.C. 78k (b)], and 28 U.S.C. 1732 (shop book rule) are found in the appendix, *infra*, pp. 19-22.

STATEMENT

Petitioners were all convicted after a jury trial in the United States District Court for the Southern District of New York, on Count I, which charged a conspiracy to violate provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934. They were found to have sold Swan-Finch stock without filing the required registration statement, and to have used fraudulent practices to sell the stock and manipulate the market (I. 20-27, 13). Petitioners Re, Sr. (No. 404), Re, Jr. (No. 405) and Casagrande (known as Grande—No. 406) were also convicted on Count II of unlawfully selling 8,900 shares of Swan-Finch without the required registration

statement (I. 28, 13). These convictions[2] and the sentences imposed thereon were affirmed on appeal.

As background for the questions presented, the pertinent facts may be briefly summarized as follows:

Defendant, Lowell M. Birrell, who was a fugitive at the time of trial, gained control of Swan-Finch in May 1954 (II. 147, 149). Thereafter he granted Re, Sr. and Grande a three-month option to buy 10,000 shares of Swan-Finch at an unspecified price (II. 149). Re, Sr. and Re, Jr. became the specialists on the Exchange in Swan-Finch, which prior to that time had been an inactive stock (II. 5, 149). Through stock splits and various corporate acquisitions the total amount of Swan-Finch stock was increased from 34,794 shares to 2,800,000 shares (I. 40-44, II. 11-12, 150). None of the Swan-Finch stock was ever registered with the S.E.C. (II. 150).

In order to move a large volume of his stock, Birrell obtained the services of over-the-counter "boiler-

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[2] Petitioner Casagrande appealed only his conviction on the substantive Count II and not on the conspiracy Count I (Pet. 406, p. 2). Petitioner Batkin was not named in Count II. His conviction on Count III was reversed.

[3] Petitioners Re, Sr. (No. 404) and Re, Jr. (No. 405) were each sentenced to six months in jail, plus three years on probation, and were each fined $10,000 on Count I and $5,000 on Count II (I. 277-280). Petitioner Batkin (No. 410) was sentenced on the conspiracy count to six months in jail, plus probation for three years, and was fined $10,000 (I. 281-282). Petitioner Casagrande (No. 406) was placed on probation for three years and was fined $10,000 on Count I and $5,000 on Count II (I. 275-276).

room" operations including that controlled by petitioner Batkin (I. 39-40, II. 6-7, 15-16, 151-152). The Res sold a huge volume of Swan-Finch stock through use of accounts which they controlled in the names of various people (II. 13-15, 44-45, 148, 150-151, I. 81, 146-149, 150-151). Meanwhile the market on the Exchange was maintained through controlled purchasing by the Res and others (II. 149-150). For all these "services" Birrell made extensive "under the table" cash payments to the Res, Batkin and others (I. 39, 136-139, 153-155, II. 16-19, 20-32, 33-39, 48, 54-74, 111-114, 149, 152).

ARGUMENT

The sufficiency of the evidence to show a scheme to manipulate the price of Swan-Finch stock is not challenged. Some of the issues raised relate to the interpretation of the statute in the context of the special facts of the case, and others deal with evidentiary matters. All are fully answered by the decision below and none involves a conflict of circuits. There is thus no reason for review by this Court.

1. The Alleged Intrusion into the Attorney-Client Privilege.

The claim by the Res (Nos. 404 and 405)[4] that the government's use of Mr. Birnbaum as a witness involved an infringement of their attorney-client relationship is answered by the facts which were fully developed at the trial.

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[4] Each petitioner has adopted the questions presented by the others, but not all questions apply to all petitioners.

Mr. Birnbaum was a government witness who identified many records of Birnbaum & Company and testified relative to the acquisition of property by Swan-Finch, disposition of Swan-Finch stock, and his relations with Lowell Birrell (I. 40-48, II. 7-12). During the course of the examination the government sought to introduce a letter from petitioner Grande to Birnbaum, but the signature had not been reproduced on the Thermo-Fax copy used (I. 53). After Birnbaum had finished testifying the government obtained from the law firm which represented Birnbaum & Company a "photostat" which did reproduce Grande's signature (I. 53-54). At this point counsel for the Res requested a hearing claiming that their clients' rights had been violated because a lawyer from the firm that represented Birnbaum had at one time represented the Res and thus had received confidential information regarding their dealings in Swan-Finch (I. 56, 65-71, 82). The court held a hearing outside the presence of the jury. At the hearing, the attorney (called "Z" by the court below) testified that his firm had long represented Birnbaum & Company and that he represented the company in 1956 in an action to enjoin violations of the Securities Act with reference to Swan-Finch (I. 86). In that litigation the Res had been represented by other counsel (I. 87). In January, 1961, the Res retained "Z" in connection with hearings before the S.E.C. in Washington relative to the revocation of their broker-dealer license (I. 89-92). At that time the lawyer disclosed to the Res that he represented Birnbaum but said he saw no conflict (I. 100). After that mat-

ter was completed, the lawyer appeared with the Res before a United States Commissioner and had a conference with the United States Attorney's office relative to a criminal matter (I. 92-94).[3] He did not further represent the Res and did not represent the Res on the present indictment (I. 94-95).

The attorney ("Z") never discussed with Birnbaum Birnbaum's testimony before the grand jury; at most he merely arranged a time and place for Birnbaum to appear before the grand jury (I. 95-97, 103). Nor did he ever discuss Birnbaum's trial testimony with Birnbaum. He never disclosed to any government official any confidential communication received from the Res (I. 103). During the years in which the firm represented Birnbaum, other members of the firm handled other business for the Birnbaum Company during which time they obtained documents from their client (I. 88-89). Another member of the firm gave the government the copy of the document used at the trial (I. 97, 107-108).

The government attorney in charge of this litigation testified that he was aware that "Z" had previously represented the Res. Although he may have spoken with "Z", he had no conversations relative to Birnbaum (I. 105-110). Other government attorneys could not recall any conversations with the attorney relative to the substantive testimony of Birnbaum (I. 113-117, 118-119, 119-121).

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[3] The complaint involved violations relative to dealings in the stock of Thompson-Starrett Company, Inc. (see II. 142-144).

After hearing argument, the trial court concluded: that under no reasonable hypothesis could a finding be made that Birnbaum's testimony resulted from communication with "Z"; that the exhibit involved (the Grande letter) originally came from the file of Birnbaum & Company and thus was unconnected with the representation of the Res; and that, with one exception, Birnbaum had testified merely as to records of the company. Accordingly, the court found that no rights of the petitioners had been violated (I. 134).

Having failed, after a full hearing, to show that any confidences were violated, petitioners seek to invoke an "irrebuttable presumption" that the attorney's former representation of the Res made him "a potential conduit of the confidential utterances of his former clients to the ears of the witness and the prosecutor" (Pet. 404, pp. 11-12). But "Z" could not have been such a "conduit" because he never discussed Birnbaum's testimony with Birnbaum. Moreover, even if there were a conflict of interest, this cannot bar the government, which had no part in the alleged wrong-doing, from using either documentary evidence belonging to the Birnbaum Company or the testimony which Mr. Birnbaum could give on his own. In short, there cannot be an irrebuttable presumption of the kind petitioners seek to invoke in relation to a witness (in this case not even a major witness) in a criminal case. The facts here show that the government neither sought nor obtained any breach of confidence. There is thus no issue requiring review by this Court.

2. Business Records

In order to manipulate the market and profitably to distribute the shares of Swan-Finch he had obtained, Birrell made "under-the-table" cash payments according to a set formula. Curtis Whitney, who had worked for Birrell, explained that he would cash checks at the direction of Birrell, and either give the proceeds to Birrell for payment to named individuals or, under instructions, would deliver specified sums of cash in envelopes to messengers for Batkin or the Res (I. 153-155; II. 54-74). He kept track of where the money went by notations on envelopes (II. 56-57) or in the check book (II. 69; I. 164) and supplied this information to Birrell's bookkeeper, Mr. De Risi (I. 164; II. 77-87).[6]

The funds for making cash payments were drawn from checking accounts in the names of nominees (II. 78-93).[7] The bookkeeper, Mr. DeRisi, maintained books for each account, working on them two or three times a month to keep them current (I. 173). He there recorded the recipient of the cash payment as it appeared on the check book, or as he had obtained

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[6] The messenger for Batkin, Richard Orlando, and the messenger for the Res, Irwin J. Opper, both testified to picking up cash in envelopes from Whitney (II. 20-30, 33-39). The Res exchanged checks for currency without that fact appearing in any accounts (II. 44-45). There were extensive cash deposits by Batkin's company (II. 108-110, 111-114). There is some evidence that the Res sent their messenger to Birrell for an evelope with a settlement schedule attached (II. 12-15, 122-123).

[7] Some of the nominees had pre-signed checks in blank, and Whitney used these to obtain funds from the accounts (see "Espinosa," I. 139-141; "Rivero", I. 142, II. 46; "Workman", II. 74).

the name from Whitney or others (I. 175).[8] All the nominee accounts were kept the same way (I. 180-183), in the regular course of business (I. 173). On request of Mr. Birrell, the bookkeeper sometimes prepared schedules of the distribution of cash items (I. 186).

These records qualify as business records under the definition in the Federal Business Records Act, 28 U.S.C. 1732, which includes records of a "business, profession, occupation, and calling of every kind." The fact that the conspirators chose to do business on a cash basis, goes only to the personal knowledge of the maker of the records and affects their weight, not their admissibility. These accounts are in the same names that were used in the brokerage accounts for the distribution of Swan-Finch stock (I. 180-181; II. 155-156). They thus reflect the day-to-day operation of the business of distributing the Swan-Finch stock and were useful in its efficient operation. *Palmer* v. *Hoffman*, 318 U.S. 109; *United States* v. *Bernard*, 287 F.2d 715 (C.A. 7), certiorari denied, 366 U.S. 961.

While the court of appeals did not reach the alternative ground for admission, we think it manifest that these records also amounted to a cash payroll of the operation. Once the conspiracy was established, they were admissible as declarations in furtherance of the unlawful project. *Schine Theatres* v. *United States*, 334 U.S. 110, 116-117; *United States* v. *Lieb-*

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[8] The recipient was recorded as "Jerry Re" (I. 167), "Bob" (Batkin), "J.R." for Re, Sr. (I. 169-171) or "G. Re" (I. 190).

lich, 246 F. 2d 890, 893 (C.A. 2), certiorari denied, 355 U.S. 896.

3. Admission of Statements Made Before the S.E.C.

During the course of the trial the government offered the statements of Charles Grande, Re. Sr., and Re. Jr. which had been given before the S.E.C. Each was offered only against the respective maker and the trial court repeatedly admonished the jury as to their admissibility only against the maker (II. 40-44). Furthermore, in the charge to the jury the court again emphasized that these statements, which were introduced to show the consciousness of guilt of the particular defendant, were to be considered only with respect to the defendant who had made the statement (I. 262). Finally, as a precaution against any possible prejudice, all references to other defendants were deleted from the statement (II. 40). Under these circumstances, there is no merit to the claim of petitioner Batkin, who was not even mentioned in the statements, that there was error in the admission of such statements (Pet. 410, pp. 11-15). *Opper* v. *United States*, 348 U.S. 84; *Delli Paoli* v. *United States*, 352 U.S. 232.

4. The Anti-Manipulation Statute as Applied to Specialists.

The Res (Nos. 404 and 405) contend that the recognition in the Securities Act of 1934 of the function of specialists (15 U.S.C. 78k) is inconsistent with the prohibitions against manipulation (15 U.S.C. 78i) and that therefore the statute is unconstitutionally vague as applied to specialists.

One of the objects of the conspiracy charged was a violation of 15 U.S.C. 78i(a)(2) which makes it unlawful to "effect, alone or with one or more persons, a series of transactions in any security * * * creating actual or apparent active trading * * * or raising or depressing the price * * * for the purpose of inducing the purchase or sale of such security by others." It is true that a specialist who maintains the orders to buy and sell a particular stock on the exchange may be allowed, under 15 U.S.C. 78k (b), to act as a dealer in his own stock provided he shall "restrict his dealings so far as practicable to those reasonably necessary to permit him to maintain a fair and orderly market * * *." The section, however, makes it unlawful for a specialist to disclose information on his book as to the orders placed and makes it unlawful "to effect on the exchange any transaction except upon a market or limited price order."

At the specific request of the Res (II. 116-119) the jury was charged that, in applying this section to the Res, the jury was to determine whether the evidence showed they were maintaining an orderly market or whether the government had proved beyond a reasonable doubt that they were knowingly manipulating the price in violation of the statute (I. 230-231). As the court of appeals points out, the jury's verdict was a "determination that the Res were not performing the function of specialists in their dealings with Birrell in Swan-Finch" (II. 159). Petitioners' argument as to vagueness is essentially that a jury cannot distinguish between acts done in good faith and acts done in bad faith. This is the kind of

issue which a jury must pass upon in many cases and certainly in every case involving fraud. The necessity of finding intent does not render a statute vague. *United States* v. *Petrillo*, 332 U.S. 1.

The facts summarized in the opinion below (II. 149, 150) show clearly that the activities of the Res were not directed to maintaining "a fair and orderly market" but were in fact directed toward changing the price for "the purpose of inducing the purchase or sale" of Swan-Finch. Indeed the Res violated specific provisions of the statute relating to specialists by disclosing their book orders. Thus there is no real issue in this case as to legitimate action by specialists.

5. The Application of the Statute to Control Stock.

Read together Sections 4 and 5(a) of the Securities Act prohibit the public sale of unregistered securities by "an issuer, underwriter, or dealer". An "underwriter" is defined as one who offers or sells for an "issuer" or who has a direct or indirect participation in any such undertaking [15 U.S.C. 77b (11)]. An "issuer" includes "any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer" [15 U.S.C. 77b (11)].

Petitioners argue that the statute is vague since "control" or "controlling" is not defined.[9] The word

[9] The word "control stock" is not used in the act. It is a short-hand expression for stock which is subject to registration when sold by an underwriter for an issuer who is in control.

"control" as used in the Act is not a word of art. It has the ordinary meaning of being able to direct management policies through ownership or control of voting securities. See *Securities & Exchange Commission* v. *Culpepper*, 270 F.2d 241, 245, fn. 3 (C.A. 2). In this case it is conceded (Pet. 410, p. 6) that Birrell was in control of Swan-Finch. Since petitioners sold or participated in the sales for Birrell as "issuer", they are "underwriters" under the Act and were thus subject to the prohibition against the sale of the unregistered Swan-Finch stock. See *United States* v. *Crosby*, 294 F.2d 928, 939-940 (C.A. 2), certiorari denied *sub nom. Mittelman* v. *United States*, 368 U.S. 984.

Petitioners' objections to the charge (Pet. 410, p. 10) were not made at the trial (see II. 116-119) and therefore come too late. Rule 30, F.R.Crim.P. In any event, the instructions define an underwriter and not an issuer and thus properly use the statutory terms applicable to underwriters [See 15 U.S.C. 77b (11)].

6. Use of a Means of Communication in Interstate Commerce.

The Res (No. 404 and 405) and Casagrande (Pet. 406) challenge their conviction on Count II, arguing that the sale of the stock there involved, on the floor of the American Stock Exchange, did not fall within the scope of 15 U.S.C. 77e(a)(1) which prohibits the sale of unregistered securities directly or indirectly through the "use of any means or instruments of * * * communciation in interstate commerce * * *" (Pet. 405, pp. 14-16). This contention affects only the validity of the fines on Count II.

Count II of the indictment charged, in the words of the statute, that petitioners unlawfully, "directly and indirectly, made use of means and instruments of communication in interstate commerce, to wit, the facilities of the American Stock Exchange, a national securities exchange" to sell 8900 shares of unregistered Swan-Finch stock (I. 28). The bill of particulars specified that the means or instruments of communications allegedly used were the "Floor of the American Stock Exchange and the ticker-tape" (I. 274). The evidence disclosed that on April 3, 1957, while on the floor of the exchange, Re, Sr. told Townsend E. Allen, a broker on the American Stock Exchange, to sell 8900 shares of Swan-Finch for the account of Charles Grande (I. 146). After having the order recorded by his firm (I. 147, 149-150), Allen went to Re's post, since Re was the specialist in Swan-Finch, and orally announced that he had 8900 shares of Swan-Finch to sell. Re, Sr. proceeded to sell 7900 shares from previously received orders in his book, and Allen sold the remaining 1,000 shares to others standing nearby (I. 147-148). Like every other sale on the Exchange, the sale was reported on the nationwide ticker-tape (II. 49-51).

The court below properly held that a transaction on the floor of the national stock exchange, the market place and nerve center of national financial activity, involves the use of a means of communication in interstate commerce within the purview of Section 5(a)(1) of the 1933 Act. The American Stock Exchange is a vital link in the thread of the nationwide communication used in securities transactions—indeed it

is a nerve center of the nationwide market. As such, no sale on the floor of the exchange is possible without at least the indirect use of some means of communication in interstate commerce—which is one of the explicit bases for invoking federal jurisdiction under the Securities Act of 1933.

The Act as a whole makes plain that Congress intended to exercise the full extent of federal power in order to prevent the instrumentalities of interstate commerce from being used in the unlawful sale of securities. See *Schillner v. H. Vaughan Clarke & Co.*, 134 F.2d 875, 878 (C.A. 2). The broad language of prohibiting "directly or indirectly" the use of "any" means or instruments of communication in interstate commerce, is clearly designed to effectuate this broad power. The oral instructions and oral trade on the floor cannot be treated in isolation, separate from the whole system of the exchange of which they are a part.

That the exchange itself could be regarded as a means or instrument of communication was specifically recognized by the S.E.C. in *Brooklyn Manhattan Transit Corp.* 1 S.E.C. 147, 173 (1935). This early construction of the act by those responsible for making it work is entitled to great weight. See *F.T.C. v. Mandel Brothers*, 359 U.S. 385, 391; *United States v. Chicago North Shore R. Co.*, 288 U.S. 1, 13-14; *Great Northern Ry. Co. v. United States*, 315 U.S. 262, 275, see also Loss, *Securities Regulation* 1520-1521, fn. 4 (2d ed., 1961).

Petitioners cite no cases or authorities to the contrary. Their main argument is that subsequent legis-

lation, the Securities Exchange Act of 1934, shows that the 1933 Act had a narrower compass. The 1934 Act prohibits acts which involved "the use of the mails," or "any means or instrumentality of interstate commerce," or "of any facility of any national securities exchange." The term "facility" is defined to include the "premises, tangible or intangible property whether on the premises or not, any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange,"—including *inter alia* a ticker-tape. The inclusion of all these aspects of an exchange beyond the floor of the exchange itself, some of which may well be said to go beyond the direct or indirect use of "any means or instruments of transportation or communication in interstate commerce" (the 1933 Act definition), neither enlarges nor diminishes the scope of the 1933 Act. Certainly, for example, a nationwide ticker is a means of interstate communication under the 1933 Act, even though it is also a facility of a national securities exchange under the definitions of the 1934 Act. Indeed, if the 1934 Act proves anything with respect to the 1933 Act, it shows that Congress specifically recognized that national exchanges were actually a means of interstate commerce and that Congress sought in 1934 to cover anything that might affect that means. Considering the broad purpose of the 1933 Act to cover national dealing in stock, the 1934 Act tends to confirm, rather than to negate, the view that the floor of the Exchange is an instrumentality of communication in interstate commerce.

Furthermore, we think it manifest that the Res and Grande recognized that the ticker-tape would be an inevitable part of this transaction. Indeed the conspirators' use of boiler-room facilities for other trading accentuates the recognition that this particular sale was to be handled in such a way that it would be reflected on the national market. Thus this sale, like all sales on the Exchange, contemplated the use of a means of communication in interstate commerce.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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OCTOBER 1964

APPENDIX

STATUTES INVOLVED

Section 2 paragraph 11 of the Securities Act of 1933, 48 Stat. 74, 75, as amended, 68 Stat. 683, 684, provides [15 U.S.C. 77b(11)]:

> The term "underwriter" means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

Section 4 of the Securities Act of 1933, as amended, 68 Stat. 684, provides in pertinent part [15 U.S.C. 77d(1)]:

> *Exempted transactions.*
>
> Sec. 4. The provisions of section 5 shall not apply to any of the following transactions:
>
> (1) Transactions by any person other than an issuer, underwriter, or dealer; * * *

Section 5 of the Securities Act of 1933, 48 Stat. 77, as amended, 68 Stat., 684 provides in pertinent part [15 U.S.C. 77e(a)]:

> Sec. 5. (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—
>
> (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

Section 3(a)(2) of the Securities Exchange Act of 1934, 48 Stat. 882, provides in pertinent part [15 U.S.C. 78c(a)(2)]:

> The term "facility" when used with respect to an exchange includes its premises, tangible or intangible property whether on the premises or not, any right to the use of such premises or property or any service thereof for the purpose of affecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and any right of the exchange to the use of any property or service.

Section 11(b) of the Securities Exchange Act of 1934, 48 Stat. 891 provides in pertinent part (15 U.S.C. 78k(b)]:

> When not in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, the rules of a national securities exchange may permit (1) a member to be registered as an odd-lot dealer and as such to buy and sell for his own account so far as may be reasonably necessary to carry on such odd-lot transactions, and/or (2) a member

to be registered as a specialist. If under the rules and regulations of the Commission a specialist is permitted to act as a dealer, or is limited to acting as a dealer, such rules and regulations shall restrict his dealings so far as practicable to those reasonably necessary to permit him to maintain a fair and orderly market, and/or to those necessary to permit him to act as an odd-lot dealer if the rules of the exchange permit him to act as an odd-lot dealer. It shall be unlawful for a specialist or an official of the exchange to disclose information in regard to orders placed with such specialist which is not available to all members of the exchange, to any person other than an official of the exchange, a representative of the Commission, or a specialist who may be acting for such specialist; but the Commission shall have power to require disclosure to all members of the exchange of all orders placed with specialists, under such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. It shall also be unlawful for a specialist acting as a broker to effect on the exchange any transaction except upon a market or limited price order.

Section 1732 of Title 28 provides in pertinent part:

In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regu-

lar course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term "business," as used in this section, includes business, profession, occupation, and calling of every kind.

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